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Nos. 75-637, 75-697 and 75-705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

MOBIL OIL CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION

PUBLIC SERVICE COMMISSION OF NEW YORK, *Petitioner*

v.

FEDERAL POWER COMMISSION

MUNICIPAL DISTRIBUTORS GROUP, *Petitioner*

v.

FEDERAL POWER COMMISSION

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED DISTRIBUTION COMPANIES IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-437

MOBIL OIL CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION

No. 73-457

PUBLIC SERVICE COMMISSION OF NEW YORK, *Petitioner*

v.

FEDERAL POWER COMMISSION

No. 73-464

MUNICIPAL DISTRIBUTORS GROUP, *Petitioner*

v.

FEDERAL POWER COMMISSION

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED DISTRIBUTION COMPANIES IN OPPOSITION

United Distribution Companies (UDC hereby state their opposition to the petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on April 16, 1973.

OPINIONS BELOW

The initial opinion of the Court of Appeals (Mobil App. 5-64) and its opinion on rehearing (Mobil App. 3-4) are not yet reported. The opinion (No. 598 of the Federal Power Commission (Jt. App. 559-668) and its opinion on rehearing (No. 598-A, Jt. App. 866-879) are reported at 46 F.P.C. 86 and 46 F.P.C. 633.[1]

JURISDICTION

The judgment of the Court of Appeals was entered On April 16, 1973 (Mobil App. A, pp. 1-2). Timely petition for rehearing was denied by order entered June 11, 1973 (Mobil App. B, pp. 3-4). This Court's jurisdiction is invoked by Petitioners under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTE INVOLVED

The relevant provisions of Sections 4, 7 and 19(b) of the Natural Gas Act, 52 Stat. 821-833, as amended, 15 U.S.C. §§ 717-717w are set out as Appendix D to the petition in Case No. 73-437 (Mobil App. 65-69).

THE UNITED DISTRIBUTION COMPANIES

The United Distribution Companies is an *ad hoc,* voluntary group of 32 gas distribution companies serving approximately 48 million people, and comprising approximately 25 percent of the gas distribution opera-

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[1] Copies of the judgment, opinions and orders of the Court of Appeals appear as appendices to Mobil Oil Corporation's petition, which appendices are incorporated herein by reference. The opinions and orders of the Federal Power Commission appear in the printed Joint Appendix in the Court of Appeals of which forty copies of the pertinent volume have been filed with the Mobil petition.

tions throughout the United States.[2] It was originally formed for the purpose of participating in these proceedings before the Federal Power Commission because these companies were no longer able to obtain the gas supplies required by growing demands of the consumers they serve.

COUNTER-STATEMENT OF THE CASE

On May 10, 1961, the Commission initiated the first Southern Louisiana Area Rate Case in Docket AR61-2 (25 F.P.C. 942). On September 25, 1968, it issued its Opinion No. 546 in that proceeding. On March 20, 1969, it issued Opinion 546A on rehearing and at the same time initiated a second Southern Louisiana proceeding in Docket AR69-1. Opinion Nos. 546 and 546A in the first proceeding were appealed to the United States Court of Appeals for the Fifth Circuit and a decision affirming the Commission's order was issued on March 19, 1970. *Austral, et al.* v. *FPC,* 428 F.2d 407 (1970)[3]

The Court stated, however:

> The mandate of this Court should not, however, be interpreted to interfere with Commission action that would change the rates we have approved here. We specifically and emphatically reject the contention advanced by the MDG that the Commission has no power to set aside rates once determined by it to be just and reasonable when it has reason to believe its determinations may have been erroneous. (428 F.2d at 444-45)

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[2] Petitioners Municipal Distributors Group (MDG) contend that they have some special credibility because they are municipally owned whereas other parties are owned by stockholders. One of the UDC member companies, Citizens Gas and Coke Utility, is a municipally owned distribution company, in Indianapolis. It serves more residential customers than Memphis, the principal MDG member.

[3] Also referred to as *Southern Louisiana I.*

Subsequently, after several applications for rehearing were filed the Court asked the Commission to respond to the question whether the Court in the exercise of its equitable powers could affirm an order of the Commission while preserving the authority of the Commission to stay, modify or rescind the order if the circumstances seem to make such action advisable. After the issue was briefed by all parties and the Commission requested a remand, the Court stated:

> We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19 (b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers *we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.* (444 F.2d at 127 (1971)) [Emphasis added]

Petitions for certiorari were filed by the Municipal Distributors Group (MDG), the Public Service Commission of New York (PSCNY) and others challenging the authority of the court below to authorize the Commission to reopen an opinion which had been affirmed and to make retrospective adjustments to the rates therein prescribed. Certiorari was denied. 400 U.S. 950 (1970)

Thereafter, the Commission reopened the proceeding in AR61-2, and in its Opinion No. 598 issued July 16, 1971, held that its previous action was mistaken and disposed of the issues in the first Southern Louisiana

Case, AR61-2, and the second Southern Louisiana Rate Case, AR69-1.

In the proceeding below, there were extensive hearings, comprising 57 volumes of transcript and including 111 exhibits, in addition to the record compiled prior to the Southern Louisiana I decision.

UDC offered evidence showing: (1) the causes and magnitude of the gas shortage, (2) the exploratory effort and capital expenditures necessary to meet future requirements, (3) the cost of producing gas, (4) the inadequacy of past rates to meet costs and (5) the significant lagging of gas prices behind inflationary trends. UDC also presented evidence showing that the annual increments of new gas supply required by its member companies, but not available for purchase for the years 1970 through 1975, total 3.3 trillion cubic feet. (R. 886G-886N, Ex. No. 1)

Executives of UDC member companies testified as to their inability to purchase the required volumes of natural gas. (R. 887-898, 900-910, 912-918, 920-923, 925-936, 938-954, 2410-2512)

On April 1, 1970, the Administrative Law Judge convened a settlement conference in accordance with Commission rules and negotiations were conducted, concurrently with the taking of evidence, looking toward a settlement of the issues.

As a result of these settlement negotiations, UDC filed with the Commission an offer of settlement which had the support of most but not all of the parties. (R. 13652, 13665) All parties were given an opportunity to respond. In addition to UDC, the settlement was supported by the Staff of the Commission, the Associated

Gas Distribution Companies, which serve about 10 million customers at retail, by all interstate pipelines purchasing gas from the Southern Louisiana Area and by 46 natural gas producers comprising 80% of the total gas production flowing from the area. (R. 13575-6)

The Commission made the Settlement Proposal a part of the record and set the matter for further hearing. (R. 13575) All parties were given full opportunity to submit additional evidence specifically addressed to that proposal.

UDC submitted evidence of the witness Baker Clay showing, among other things, the inadequacy of prior rates. (R. 10636) Mobil and MDG introduced evidence in opposition to the settlement. Briefs and reply briefs were filed by parties supporting and by parties opposing the settlement.

The Commission issued its Opinion No. 598 on July 16, 1971, approving the settlement on its merits and, after applications for rehearing were filed, issued Opinion No. 598-A on September 9, 1971, modifying and affirming Opinion No. 598.

The crux of the settlement approved on its merits by the Commission's decision was a three-pronged approach designed to serve as an incentive to greater exploration and development of gas in the Southern Louisiana area. First, rates were set for contracts dated prior to October 1, 1968, at 22.375¢ per Mcf onshore and 21.375¢ per Mcf offshore and at 26¢ per Mcf for all contracts after October 1, 1968.

Second, a contingent escalation was provided on contracts dated prior to October 1, 1968, of 0.5¢ per Mcf when new reserves dedicated to the interstate market

from the Southern Louisiana area total 7½ trillion cubic feet prior to October 1, 1977. Further successive 0.5¢ per Mcf increases were allowed when new reserves total 11¼ trillion cubic feet and again when 15 trillion cubic feet are committed prior to that date.

Third, producers in Southern Louisiana were required to refund $150,000,000 of amounts previously collected, provided, however, that a producer could reduce the refund obligation by 1¢ for each Mcf of new gas reserves committed to the interstate market from the Southern Louisiana area. New gas used for reducing refunds would not be counted in computing the volumes for purposes of contingent escalations.

The case was appealed to the United States Court of Appeals for the Fifth Circuit which, after reviewing the issues and the extensive record, found no error.

ARGUMENT

THERE ARE NO ISSUES RAISED IN THE PETITIONS FOR CERTIORARI WHICH WARRANT REVIEW OF THE DECISION OF THE COURT BELOW

The Federal Power Commission is an expert body which was confronted by difficult problems relating to area prices for natural gas in Southern Louisiana, which produces one-third of the nation's gas supply. It held extensive hearings and on the basis of the complete record adopted a multi-faceted solution to the very real problems of supply and rate making policy. It used price and other incentives in an attempt to stimulate the exploration for and production of natural gas while keeping its rates at the lowest practicable level. The various elements to the solution are interrelated and no element can be judged without looking

at the whole package. The Commission's solution was supported by detailed findings and conclusions, all of which were reviewed in detail by the court below, which concluded that the Commission had acted within its statutory authority on the basis of substantial evidence.

The substantive issues raised in the Petitions for Certiorari have been carefully considered by the Commission and the court below and do not warrant further review.

I.

The Decision Below Does Not Conflict With the Decision of the District of Columbia Circuit in the Texas Gulf Coast Area Rate Case

Petitioners contend that the approval of the incentive provisions by the decision below is in conflict with the opinion of the District of Columbia Circuit in the *Texas Gulf Coast Area Rate Case*.[4] This contention does not withstand analysis. *Texas Gulf* was remanded to the Commission for further consideration of the incentive provisions because the decision (1) was not supported by evidence in the record and (2) did not provide an explanation of how the Commission reached its conclusions (*Texas Gulf* slip op. 10, 53, 55, 60, 65-66, 69). This holding is completely consistent with the result reached by the Fifth Circuit in the instant case where the Commission acted on the basis of a complete record and extensive findings.

After the Fifth Circuit's initial *Southern Louisiana* decision, the Commission convened additional hearings. When those hearings led to a settlement proposal, the

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[4] *Public Service Commission* v. *Federal Power Commission*, No. 71-1828, August 24, 1972, — F.2d — (D.C. Cir. 1972).

Commission solicited and received evidence specifically addressed to the merits of that proposal. Thus, at the time it adopted the incentive provisions, it had a full and complete record upon which to rule.

This was not the case in *Texas Gulf*. That case had been pending for years, and the record had been closed for three years at the time the Southern Louisiana Settlement proposal was submitted. The Commission obviously seized upon the three-pronged approach of the Southern Louisiana Settlement as a solution to the Texas Gulf Coast issues. In an effort to expeditiously resolve issues which had been pending too long, it did not set the proposal for hearing in *Texas Gulf* as it did in *Southern Louisiana*. No evidence was submitted or invited on the incentive provisions which were adopted *ab initio* by the Commission. After the fact, in response to petitions for rehearing, the Commission apparently recognized this defect and sought to rely upon the record developed in the instant *Southern Louisiana* proceedings.

The District of Columbia Circuit held that the Commission could not rely by reference upon the *Southern Louisiana* case for three reasons. First, *Southern Louisiana II* was not a proceeding setting a national rate, but only a separate rate for a different area. The parties were not necessarily identical and were not on notice that the *Southern Louisiana* evidence would be used in the *Texas Gulf* proceeding. Second, the Commission's *Southern Louisiana II* opinion was actually issued one month *after* the *Texas Gulf* opinion. Third, *Southern Louisiana II* was based upon a settlement proposal under which, as the court recognized, there might well be a compromise of issues which might otherwise have been litigated. At 51-52.

Thus, the Court of Appeals for the District of Columbia held only that the Commission could not rely upon the instant *Southern Louisiana II* proceeding to justify the adoption of incentive procedures in *Texas Gulf* and without that reliance the record was not sufficient to support the Commission's conclusions.[5]

This result does not conflict with the ruling of the court below where the record was sufficient to justify the utilization of incentive procedures to stimulate greater natural gas production and where the issues raised by these procedures were fully addressed by the parties to the proceeding and considered by the Commission.

In addition to the absence of necessary conflict between the results reached by the Fifth Circuit and the District of Columbia Circuit, there is likewise no conflict as to approach. Both courts applied the standards of review set by this Court in the *Permian Basin Area Rate Case,* 390 U.S. 747 (1968).[6] Both expressly followed the three-pronged test for reviewing area rate

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[5] Judge Leventhal's opinion in *Texas Gulf* expresses some concern over the appropriateness and legitimacy of the incentive provisions in that case. However he did not regard the incentive provisions as invalid *per se,* but felt instead that the record and the Commission's opinion did not support the need for these measures. For example, Judge Leventhal stated:

> In view of the absence of Commission analysis, we observe that our comments do not constitute an implacable prohibition on the use of flowing gas to raise required revenues. We have, however, identified substantial problems that the FPC will have to consider on remand. At 60.

See also Texas Gulf at 53, 55, 60-61, 64, 65-66, and 69.

[6] *Southern Louisiana II,* 11-13; *Texas Gulf,* 17-19.

determinations enunciated by Mr. Justice Harlan in *Permian:*

> It follows that the responsibilities of a reviewing court are essentially three. First, it must determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Third, the court must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interest, both existing and foreseeable. 390 U.S. at 791-92.

In the *Texas Gulf* case, the court found that the substantial evidence test was not met and that, in fact, there was no evidence in the record to support the adoption of production incentives. In the instant case, however, these issues were specifically addressed by the parties and the Commission's ruling was based upon that record. Thus, the asserted conflict does not exist and does not form a basis for review by this Court.

II

The Commission's Action Was Supported by Substantial Evidence

The function of the FPC as an administrative agency is to develop a body of expertise within its area of administration. The exercise of this expertise by the FPC should not be disturbed so long as it conforms

to the requisites of due process and statutory authority including the substantial evidence requirements of § 706 of the Administrative Procedure Act, 5 U.S.C. § 706, and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717.

The record in this case is replete with well documented testimony and evidence placed into the record in open hearing and subject to cross-examination, which adequately satisfy the Commission's need for substantial evidence on which to base its determinations. It is well settled that a presumption of validity attaches to each exercise of the Commission's expertise.[7]

The evidence before the Commission in the reopened record showed that there is a supply crisis[8] (findings 40 through 106, R. 13587-13615); that there has been a decline of more than one billion dollars per year in funds devoted to exploration for hydrocarbons (R. 1456); that substantial amounts of money will be required to reverse the downward trend in the discovery and production of natural gas; that the rates prescribed in Opinion No. 546 (Southern Louisiana I) were unreasonably low; that the crude oil incentive is no longer adequate to bring about the exploration needed to find gas reserves and that gas must stand on its own feet. (R. 1457-1460)

The evidence showed that the cost findings in Opinion No. 546 (issued in 1968) were unreasonably low and that it is technically possible to find costs only within a range. In Opinion No. 598 (issued in 1971)

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[7] Permian Basin Area Rate Cases, 390 U.S. 747 at 767 (1968).

[8] R. 886G-886N, 900-910, 2410-2512, 887-898, 912-918, 920-923, 925-936, 928-954, 1454, 4787, R. 1414, 1437-1440, 1454, 1462.

the Commission properly found that Opinion No. 546 rates were not just and reasonable and did not produce sufficient return, that such opinion should be set aside, and that the refunds required therein should not be made. (R. 13615-13632; 13635-13638)

In Opinion No. 546, the Commission found the national average cost of new gas (including the Louisiana Severance Tax) to be 18.80¢ per Mcf. 40 F.P.C. 530, 589 (1968). It found the cost of flowing gas to be 18.36¢ per Mcf. 40 F.P.C. at 603. Evidence in the reopened record shows that costs substantially exceeded these findings and in its discussion in Paragraphs 107 through 158 (R. 13615 through 13632) the Commission has now found that the reasonable range of costs is at a materially higher level for both new and flowing gas.

In support of these findings, there is a wealth of new cost evidence in the new record—presented by experts for the Staff, UDC and the producers. This evidence clearly supports the need for modifying the unrealistic costing methodology of Opinion No. 546.

The Commission fixed rates within a zone of reasonableness coupled with fixed escalations and provided further incentives for the discovery and dedication of natural gas to the interstate market. It allowed a work off of refunds at one cent per Mcf for new dedications of gas to the interstate market and provided further escalations in the ceiling prices contingent upon the dedication of certain specified volumes to the interstate market. These incentives are desperately needed. The Commission concluded, on the basis of substantial evidence, that there is a strong positive relationship between price and supply, and between price and exploratory effort. (R. 13605) The record is clear that

there is a need for the incentives, and the producers of most of the natural gas in Southern Louisiana stated that the settlement, which the Commission approved, would provide incentives for further exploration and further dedications of natural gas to the interstate market.

The Commission's Opinion No. 598 deals with refunds in paragraphs 169 through 172 (R. 13635 through 13638) and, in the light of the inadequacies of Opinion No. 546, and the evidence in the new record, it adopted the compromise worked out by the proponents of the Settlement Proposal on the basis of its merits.

On the basis of the substantial evidence in the record, this action was entirely justified.

In support of the Settlement, UDC introduced the testimony of witness Baker Clay showing that revenues at the Opinion No. 546 rates fell far below industry costs during the refund period. (R. 6833-6853) Since no one is entitled to refunds unless revenues exceed costs, cancellation of all refunds could have been justified.

The Settlement Proposal recognized this situation, but rather than eliminate refunds entirely the Settlement reduced refund obligations from $375,000,000 to $150,000,000; and it then allowed the producers owing these remaining refunds to work them off through dedications of new reserves to interstate commerce.

Mobil, New York, and MDG oppose this whole aspect of the Settlement Proposal on the ground that the basic refund obligations imposed by Opinion No. 546 should not have been reduced at all.

Assuming as we have shown, that Opinion No. 546 refunds must be revised downward, the remaining $150,000,000 retained by the Settlement Proposal, as a result of negotiation, can hardly be adverse to either Mobil, New York, or MDG in the light of the evidence in the record—introduced by UDC through Baker Clay—that all refunds might be excused. Significantly neither Mobil, New York, nor MDG introduced any evidence at all comparing revenues to costs in the refund period.

As this Court observed in *Permian,* agencies must be permitted, consistent with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances. 360 U.S. at 784. Clearly, therefore, the Commission acted lawfully in changing its course on the basis of the reopened record.

III

Allegations of Discrimination Are Strained, Relate to Matters Within the Commission's Expertise and Under the Circumstances Do Not Present Substantive Issues Worthy of Consideration by This Court

All of the Petitioners join in chorus to allege that the court below has affirmed a discriminatory opinion in this case. (Pet.: N.Y. Public Service Commission p. 11-12, 18; Mobil Oil Corp. p. 9, 20; MDG p. 25)

The chief ground of alleged discrimination arises from the fact that some producers (including Mobil) have executed voluntary settlements, and made refunds so as to reduce their revenues to the general level of the Commission's Section 7 guidelines. (R. 13585-13586) Other producers have, in the meantime, collected the higher contested Section 4 and Section 7 rates. Mobil's suggestion to cure this "defect" en-

compassed "higher prices for new gas, coupled with a procedure for retrospective achievement of equity among the Southern Louisiana producers". (R. 13,586) This remedy does not appear to be supported by either the New York Public Service Commission nor the Municipal Distributors Group. However, these Petitioners have been quick to seize upon this alleged discrimination as a convenient vehicle to support their petition.

Mobil's brief before the Court of Appeals leaves one with the impression that they are seeking high rates for the future to offset the low settlements which some producers agreed to (improvidently as it transpired) in the past. The Commission has no authority to fix rates on that basis. *State Corporation Comm'n of Kansas* v. *F.P.C.*, 206 F.2d 690 (8th Cir. 1953) There is no question but that the Commission is supported by the evidence in refusing to approve the high level of rates advocated by isolated producers.

At page 22 of its petition, Mobil cites cases which held that those similarly situated should be treated with equality. These arguments are without merit because, *inter alia,* Mobil, which settled its rate cases years ago, is not similarly situated to those companies which refused to settle, and which proved, on this record, that the rates Mobil accepted would be confiscatory if applied area wide.

It would be unconstitutional for the Commission to fix confiscatory rates in order to treat all producers the way Mobil agreed to be treated.

The Commission properly observed:

> "Parties who enter into settlements or those who refuse to do so, always run the risk that the

> ultimate Commission determination may be higher or lower than the settlement levels." (R. 13628)

MDG, by its petition, would have the Court believe that the D.C. Court of Appeals, in the *Texas Gulf Coast Case,* found that the Commission's refund provisions (similar to those in the instant case) promote discrimination and are anti-competitive in effect. (MDG Pet. 13) The implication is that this was the reason for its remand. In fact, while the D.C. Court of Appeals did discuss possible discriminatory effects of the Texas Gulf Coast Opinion, it also stated that

> "To some extent discrimination is inherent in the contingent escalation because it works on an industry basis, rather than on an individual producer basis." (Slip Op. p. 67)

This is, of course, fundamental to area rate making. The primary reason for remand there was not the alleged discriminatory potential of the Opinion, but the lack of sound explanation as to why the Commission held as it did. (Slip Op. p. 69)

The refund provisions in the instant case were found by the court below to have been subjected to "cross examination and additional evidentiary scrutiny." (Slip Op. p. 52) The Court, therefore, had a strong foundation of substantial evidence on which to premise its finding that the "... FPC was acting within the bounds of its discretion when it adopted the refund credit work-off program." (Slip Op. p. 53)

Clearly, there can be no area rate-making without some degree of discrimination or difference in impact on individuals. Only unreasonable discrimination is unlawful and the expert body which reviewed the

evidence, after cross-examination, concluded that the refund credit workoff was reasonable. The Court below properly found this action within the bounds of the Commission's discretion.

The treatment of refunds was only one facet of an opinion in which the Commission utilized a combination of formulae and pragmatic adjustments in an attempt to protect the interest of future as well as past consumers. It applied its expertise to intensely practical problems in the area of its discretion in time of a supply crisis.

IV

There Is No Good Reason for Reviewing the Court's Affirmance of the Commission's Approval of the Settlement Provisions Establishing Minimum Rates for Transportation of Liquids and Liquefiable Hydrocarbons

The Commission, on the basis of substantial evidence and on its merits, approved the settlement provisions fixing minimum rates which the producers must pay to pipeline purchasers for the transportation of liquids and liquefiables owned by the producers. This was necessary to preserve and protect the Commission's action on the price of the natural gas.

Mobil contends that the Commission exceeded its authority, that is, that producers should be completely free to negotiate with pipeline purchasers for the transportation of liquids and liquefiables at less than cost, and thus possibly to obtain an effective price for gas in excess of the ceiling price for the gas fixed by the Commission.

Liquids and liquefiables are often mixed with gas at the wellhead and must be transported from the platform to the processing plant in a mixed stream.

The Commission had determined that 26 cents was a just and reasonable price for the gas. If the producer could negotiate for transportation of commingled liquids by the pipeline purchaser at less than the proven cost to such purchaser, clearly the Commission's action on the price for the gas could be circumvented. In such event, the real price received for the gas would be greater than the lawful rate. If, based on substantial evidence, the Commission could not as a part of the approved gas rate settlement fix a minimum rate for the transportation of liquids and liquefiables by the pipeline purchaser, its regulation of the wellhead price of natural gas could be rendered ineffective.

The minimum charges established for the transportation of liquids and liquefiable hydrocarbons were found by the Court below to have been determined by the FPC on a "substantial evidentiary basis". (R. 13634, 13645) (Slip Op. p. 63) This finding is adequately supported by the testimony of W. P. Anderson (R. 6395-6410, 6692-6725) and of John L. Moye (R. 6400-6408, 6734-6747).

Mobil Oil Corporation advances the argument that the decision by the U.S. Court of Appeals for the District of Columbia in *Mobil Oil Corporation* v. *Federal Power Commission,* No. 72-1471, CADC, July 11, 1973, ———F.2d———, "is at odds" with the Court's decision in this case.

It is true that in the last cited *Mobil Oil* case, the D.C. Circuit reversed the action of the Commission in fixing minimum rates for the transportation of liquids and liquefiables in a general rule-making proceeding which the Court found completely inadequate from

the standpoint of necessary notice[10], necessary evidence[11], and necessary findings[12]. In the process of such reversal, the D.C. Circuit did hold against the Commission's jurisdiction over transportation of *liquids*. At the same time, it recognized, as did Mobil, the Commission's minimum rate authority over the transportation of *liquefiable hydrocarbons*.[13] However, in the process of so doing, the Court there stated:[14]

> We are not confronted with a case where the Commission has demonstrated that rate jurisdiction over liquids is necessary to preserve its rate jurisdiction over natural gas.

The instant case, however, stands in an entirely different posture. The record is complete with substantial evidence adequately supporting all of the Commission's findings. In thus exercising jurisdiction over the minimum rates for transportation of liquids as well as liquefiables, the Commission has determined that such exercise is necessary to preserve its rate jurisdiction over natural gas. This determination is well supported by the testimony and evidence presented by W. P. Anderson and John L. Moye as referenced above. By its terms[15], the Commission's action on this question in this case applies only to this case, and the Commission has not acted in the general rulemaking proceeding on the same subject on remand from the decision of the D.C. Circuit in *Mobil Oil*. Thus, there is no occasion for any general review of this question at this time.

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[10] Slip Op. p. 9.

[11] Slip Op. p. 21.

[12] Slip. Op. p. 50-51.

[13] Slip. Op. p. 20.

[14] Ibid.

[15] 46 F.P.C. 86, 139.

V

The Authority of the Commission To Place Moratoria on New Rate Filings Was Previously Upheld by this Court in Permian, Was Reviewed in this Proceeding by the Court Below and No Issues of Substance Worthy of Consideration by This Court Are Raised

Mobil complains that the Commission placed a five-year moratorium on deviation from the area rates fixed in this proceeding. A moratorium was upheld by this court in the *Permian*[16] case where costs were found to be stable. In this case costs were not found to be stable and the Commission provided fixed escalations in the price of gas. It also fixed contingent escalations. Furthermore, it has provided in its rules a method by which a producer may petition for authority to deviate from the area rate ceilings. Surely, as this court held in *Permian,* the Commission cannot be required to start a new rate case every time an old one is concluded.

VI

No Good Reason Has Been Shown for Reviewing the Court of Appeals Affirmance of the Commission's Refund Discretion

Petitioners urge that the Court of Appeals erred in affirming the Commission's decision to permit the write off of refunds by the dedication of new volumes of natural gas to the interstate market. MDG asserts that under Section 4(e) of the Natural Gas Act the Commission is required to order refunds. The Court of Appeals rejected this contention, holding that Section 4(e) provides only that the Commission "may" require refunds but is not required to do so.

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[16] *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968) (Hereafter referred to as *Permian*)

This is not an all or nothing case in which the Commission was called upon to refuse refunds or grant them 100 percent. Instead, it is a case in which the Commission's refund discretion had already been expressly recognized by the Court of Appeals in its remand of *Southern Louisiana I,* from which decision this Court denied certiorari. Pursuant to that remand and after full evidentiary hearing, the Commission found that certain refund reductions, tied to the increased price of flowing gas and to work off credits for new production, all in the interest of a much needed increase in supply, would be in order.

This is not an issue meriting review by this Court. There is no conflict among the Courts of Appeal and the Fifth Circuit's holding is consistent with rulings of this Court. In fact, the District of Columbia Circuit, in the *Texas Gulf* case, expressly agreed that the question of whether or not to order refunds is a matter for the Commission's discretion. *Texas Gulf* 68-69.

In *Wisconsin* v. *F.P.C.,* 303 F.2d 380, 386 (D. C. Cir., 1961), Judge Prettyman stated that under Section 4(e) the Commission "may" order a refund and that this is not mandatory. While the Supreme Court in reviewing that case did not specifically deal with the Commission's discretion to order a refund under Section 4(e), Mr. Justice Clark in a separate opinion speaking for four justices stated that under certain conditions the Commission might have to forgive refunds. *Wisconsin* v. *F.P.C.,* 373 U.S. 294, 324 (1963) footnote 8. Subsequently, in *Permian Basin Area Rate Cases,* 390 U.S. 747, 827 (1968) this court stated that the court did not have authority to interfere with the Commission's "discretion" with respect to refunds.

The substance of MDG's argument is that "may" as used in Section 4(e) of the Natural Gas Act means "shall". It cites two cases both of which are older than the Interstate Commerce Commission, the first federal administrative agency.

This court stated in *Farmers and Merchants Bank of Monroe* v. *Federal Reserve Bank,* 262 U.S. 649, 662-3 (1922), that

> "It is true that in statutes the word 'may' is sometimes construed as 'shall.' But that is where the context or the subject matter compels such construction."

That "may" as used in Section 4(e) of the Natural Gas Act is intended to confer discretion, is also supported by the fact that "may" is used in juxtaposition to "shall" throughout the Natural Gas Act. In Section 4(e) where the "may" in question appears, "shall" is used four times. Under some circumstances certain things must be done, but the requirement of refunds is discretionary. *United States* v. *Thoman,* 156 U.S. 353 (1895), *Anderson* v. *Yungkau,* 329 U.S. 482, 485 (1947), *Horack, Sutherland Statutory Construction,* 3rd ed. Sec. 5821, *Federal Land Bank* v. *Hansen,* 113 F.2d 82, 84 (2nd Cir. 1940)

No good reason has been shown for reviewing this point of law, which is well settled.

CONCLUSION

This Court observed in *Permian* 390 U.S. 747 at 756, that since 1954 the Commission has labored with obvious difficulty to regulate a diverse and *growing* producing industry under terms of an ill-suited statute. Now the industry has stopped growing.

When the Commission attempted to regulate rates on a company-by-company basis, the administrative process broke down. (390 U.S. at 758) Since 1960 it has been attempting to regulate producers on an area basis, but area rate cases take a long time and conditions change.

As observed by Justice Jackson in a separate opinion in *Federal Power Commission* v. *Hope Nat. Gas Company,* 320 U.S. 591, 647 (1943), the exploration for and the production of natural gas are more erratic and irregular and unpredictable in relation to investment than any phase of any other utility business.

Producers are not required to invest in the high-risk, speculative adventure of searching for natural gas. They may do so and it is the Commission's responsibility to fix rates that will encourage them to do so.

It is necessary therefore that pragmatism be accompanied by innovative approaches if the Commission is to succeed in its task of steering between the Scylla of excessive rates and the Charybdis of not enough gas for the consumer.

As this Court pointed out in *Permian, supra,* at p. 698, the Commission's responsibilities extend to future customers as well as present customers. It has an obligation to provide a useful incentive to the exploration for natural gas as well as to prevent excessive producer profits. We believe it cannot be gainsaid that if past profits had been excessive there would have been no decline in exploration activity. Since the first Southern Louisiana Area Rate Case, evidence has proved to the Commission that its past regulatory

techniques have been unsuccessful in protecting the public interest in an adequate supply of gas.

In the second Southern Louisiana Case here involved, the Commission adopted a new, many-faceted approach designed to stimulate production and to encourage producers to dedicate new reserves of natural gas to the interstate markets. The Commission has attempted to harness cost and noncost factors side by side. (*Permian, supra,* at 815) And it has employed a combination of formulae in an attempt to cope with its intensely practical problems. (*Permian, supra,* at 777 and 800)

Nearly all of the parties to the proceeding below recommended this approach but a few object. NYPSC and MDG want the refunds that would have been made under the old approach. Mobil wants higher rates for the future to offset the lower rates it voluntarily accepted in past settlements. Each of the Petitioners attack individual segments of Opinion No. 598 as if each segment stood alone. No Petitioner evaluates Opinion No. 598 as a totality.

The record shows that this nation is dependent upon Southern Louisiana for one-third of its natural gas requirements, that the amount of money devoted to exploration and development has declined sharply resulting in a decline in the discovery of new gas reserves, and that enormous amounts of money will be required to reverse such decline.

The FPC has met its responsibilities by determining cost-based rates within the zone of reasonableness for both vintages of gas, by providing for the work off of refunds by the dedication of new reserves, and by further providing price escalations based upon new dedi-

cations, coupled with fixed escalations to offset inflation. The court below properly held that the Commission's order was supported by the record and that it was within its statutory authority.

WHEREFORE, the United Distribution Companies respectfully urge that certiorari be denied.

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